

The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

**WILD FISH CONSERVANCY, a Washington
non-profit corporation,**

No. 2:20-cv-0417-MLP

Plaintiff,

V.

BARRY THOM, in his official capacity as Regional Administrator of the National Marine Fisheries Service; CHRIS OLIVER, in his official capacity as the Assistant Administrator for Fisheries of the National Marine Fisheries Service; NATIONAL MARINE FISHERIES SERVICE; WILBUR ROSS, JR., in his official capacity as Secretary of the United States Department of Commerce; and UNITED STATES DEPARTMENT OF COMMERCE,

Defendants.

and

ALASKA TROLLERS ASSOCIATION,

**Intervenor-Defendant
Applicant.**

I. MOTION TO INTERVENE

Pursuant to Fed. R. Civ. P. 24(a), Alaska Trollers Association, organized in Alaska as a non-profit trade association for professional salmon trollers and salmon-related businesses, respectfully moves to intervene as of right as Defendant in the action brought by Plaintiff Wild Fish Conservancy. In the alternative, Alaska Trollers Association moves to intervene

1 permissively as Defendant pursuant to Fed. R. Civ. P. 24(b). Counsel for Alaska Trollers
2 Association conferred with counsel for Plaintiff and Defendants and they stated they will not
3 oppose this Motion to Intervene in this action. Plaintiff Wild Fish Conservancy does not oppose
4 the requested intervention but requests the setting of appropriate conditions. *See* Fed. R. Civ. P.
5 24(a) Advisory Committee Note on 1966 Amendment (“An intervention of right under the
6 amended rule may be subject to appropriate conditions . . .”). Specifically, the Conservancy
7 requests that the intervention order extend the page limits of LCR 7 for the Conservancy when
8 responding/replying to two separate briefs filed by Federal Defendants and Intervenor by an
9 additional 66% of the applicable limit (e.g., for a brief with a 12-page limit, an additional eight
10 pages would be permitted). Intervenor-Defendant Applicant agreed with that condition while
11 Defendants took no position on the Motion to Intervene or on the Plaintiff’s requested page
12 extension proposal. Accordingly, this Motion to Intervene is unopposed, but the proposed Order
13 granting intervention provides for the eight-page extension requested by Plaintiff and agreed to
14 by Intervenor-Defendant Applicant.

15 **II. INTRODUCTION**

16 On March 18, 2020, Wild Fish Conservancy (“WFC”) filed a Complaint in this Court
17 against the National Marine Fisheries Service (“NMFS”) and its Regional Administrator Barry
18 Thom, as well as Wilbur Ross, the Secretary of Commerce, the federal cabinet department in
19 which NMFS is housed. The Complaint contends that NMFS has violated Section 7 of the
20 Endangered Species Act (“ESA”) and its implementing regulations “by adopting and
21 implementing the 2019 SEAK BiOp and its incidental take statement and by continuing to
22 authorize and manage salmon fisheries in the Exclusive Economic Zone (EEZ) of Alaska without
23 ensuring that such fisheries will not jeopardize the continued existence of the endangered
24 Southern Resident Killer Whale...”. The Complaint further alleges that Defendants violated the
25 ESA and National Environmental Policy Act (“NEPA”). Plaintiff seeks a declaration that the
26 Defendants have violated Section 7 of the ESA, as alleged, and seeks a mandatory injunction

1 from the Court "... setting aside NMFS's 2019 SEAK BiOp and incidental take statement ... and
2 enjoining" ... NMFS from authorizing take associated with the salmon fisheries in the EEZ of
3 Alaska "until NMFS complies with the ESA and NEPA and further seeks to enjoin any salmon
4 fishery in the SEAK EEZ.

Because of the allegations in the Complaint and the remedy sought and as explained below, Applicant fully satisfies the standard for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, Applicant satisfies the standard for permissive intervention under Rule 24(b).

III. APPLICANT

10 Applicant Alaska Trollers Association (“ATA”) is a non-profit organization
11 headquartered in and doing business in the State of Alaska, representing the interests of
12 Southeast Alaska commercial salmon trollers. ATA’s commercial fishing boat owner-operator
13 members participate in the Southeast Alaska commercial troll salmon fishery, harvesting salmon
14 for local, national and international consumers. Decl. of Amy Daugherty at ¶ 2; Decl. of Tad
15 Fujioka at ¶ 15.

16 Plaintiff asks the Court to order “additional mitigation measures to reduce the risk of
17 insufficient prey abundance and availability” for the affected orcas, and, presumably, the
18 measures sought would include restrictions on the commercial salmon harvest. If so, ATA
19 would be directly harmed by the remedy sought by Plaintiff. The additional mitigation measures
20 Plaintiff asks the Court to impose will have a significant economic impact on the Applicant, its
21 member family businesses, and on the small Southeast Alaska rural fishing-dependent
22 communities from which they operate. The commercial salmon fishery in Southeast Alaska is
23 one of the state’s oldest and respected industries and has been long committed to sustainable
24 harvest and fishery management policies. It supports countless family wage jobs in Southeast
25 Alaska in coastal communities where such jobs are rare. ATA represents about 350 working
26 commercial fishing industry business boat operations, mostly family owned and operated, which,

1 in turn, employ directly as crew members and indirectly thousands of employees in SE Alaska .
2 Decl. of Amy Daugherty at ¶ 2; Decl. of Paul Olson at ¶ 13.

3 ATA has been working for many years to mitigate, and as much as feasible avoid, the
4 very kinds of potential conflicts between commercial fishing operations and marine mammals,
5 including Southern Resident Killer Whales, that are complained of in this action. Decl. of Amy
6 Daugherty at ¶ 9.

7 Applicant is a fishing industry-based, non-profit organization whose members use and
8 enjoy Southeast Alaska's abundant marine resources and make all or part of their living
9 sustainably harvesting those marine resources. ATA and its members have also been in the
10 forefront of protecting and restoring these marine resources through habitat restoration,
11 participation in the administrative process, and through litigation. *Id.*

12 Applicant and its commercial fishing family members also have a strong marine resource
13 conservation ethic as well as significant incentives to reduce potential conflicts between
14 commercial fishing activities and non-target marine wildlife. Applicant and its members also
15 derive recreational, scientific, aesthetic, and other personal benefits from the existence in the
16 wild of Southeast Alaska's marine resources (including other whales and orcas) through wildlife
17 observation, study, and photography, as well as aesthetic enjoyment. Decl. of Amy Daugherty at
18 ¶ 10.

19 Based upon Applicant's demonstrated interest in protecting marine resources (including
20 orcas), as well as its strong incentive to minimize the potential for conflicts between commercial
21 fisheries and other non-target marine resources (including Southern Resident Killer Whales) and
22 their ongoing stake in the outcome of this litigation, this Court should allow its intervention.

23 IV. ARGUMENT

24 A. APPLICANT IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

25 The Federal Rules of Civil Procedure provide the following:

26 "On timely motion, the court must permit anyone to intervene who: (2)
Claims an interest relating to the property or transaction that is the subject of the

1 action, and is so situated that disposing of the action may as a practical matter
2 impair or impede the movant's ability to protect its interest unless existing parties
adequately represent that interest.”

3 Fed. R. Civ. P. 24(a). This rule is to be “construed broadly in favor of the applicants.” *Idaho*
4 *Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *United States v.*
5 *Oregon*, 913 F.2d 576, 587 (9th Cir. 1990)); *see also Arakaki v. Cayetano*, 324 F.3d 1079, 1083
6 (9th Cir. 2003) (“Rule 24 traditionally receives liberal construction in favor of applicants for
7 intervention.”). *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir.
8 2009).

9 An applicant for intervention as of right must demonstrate the following:

10 (1) the intervention application is timely; (2) the applicant has a “significant
11 protectable interest relating to the property or transaction that is the subject of the
action”; (3) “the disposition of the action may, as a practical matter, impair or
12 impede the applicant’s ability to protect its interest”; and (4) “the existing parties
may not adequately represent the applicant’s interest.”

13 *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (quoting *United States v. Alisal Water*
14 *Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)). Practical considerations guide courts in applying this
15 test. *See* Fed. R. Civ. P. 24, advisory committee’s note (“If an [applicant] would be substantially
16 affected in a practical sense by the determination in an action, he should, as a general rule, be
17 entitled to intervene[.]”). In the present case, Applicant satisfies each of the necessary elements
18 for intervention of right under Rule 24(a).

19 **B. Applicant’s Motion for Intervention Is Timely.**

20 If a motion for intervention is filed prior to judgment in a case, courts examine three
21 factors to determine timeliness: (1) the stage of the proceedings at which an applicant seeks to
22 intervene; (2) the prejudice to the existing parties if intervention is allowed; and (3) the reasons
23 for and length of the delay. *California Dep’t of Toxic Substances Control v. Commercial Realty*
24 *Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (citing *United States v. Washington*, 86 F.3d
25 1499, 1503 (9th Cir. 1996)).

26 Under this test, Applicant’s motion is clearly timely. Only about five weeks have passed

1 since WFC filed its complaint, and this action is in its early stages. No administrative record has
2 yet been filed. As of the date of this filing, a Motion for Preliminary Injunction was just filed
3 and is presently noted for May 8, 2020. This Motion to Intervene is, therefore, urgent.
4 Applicant will abide by any briefing schedule set by this Court and does not anticipate seeking
5 any independent discovery. Nor does Applicant anticipate inserting any new causes of action or
6 new issues that would unduly delay relief. Under these circumstances, intervention will not
7 prejudice the existing parties or delay the proceedings. *Cf. Navajo Nation v. Superior Court of*
8 *State of Wash. for Yakima County*, 47 F. Supp. 2d 1233, 1245 (E.D. Wash. 1999) (allowing
9 Yakima Nation to intervene eight months after the complaint was filed, even though additional
10 discovery and delay was anticipated, because “discovery has not been completed and a trial date
11 has not yet been set.”).

12 **C. Applicant Has a Significant Interest in the Subject Matter of This Action.**

13 Rule 24(a) requires an applicant for intervention to possess a significant interest relating
14 to the property or transaction that is the subject matter of the litigation. This “interest test” is not
15 a rigid standard. *Fresno County v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). Rather, it is “a
16 practical guide to disposing of lawsuits by involving as many apparently concerned persons as is
17 compatible with efficiency and due process.” *Id.* (quoting *Nuesse v. Camp*, 385 F.2d 694, 700
18 (D.C. Cir. 1967)). Thus, “[t]he requirement of a significantly protectable interest is generally
19 satisfied when ‘the interest is protectable under some law, and that there is a relationship
20 between the legally protected interest and the claims at issue.’” *Arakaki*, 324 F.3d at 1084
21 (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)).

22 Applicant’s members are professional commercial fishing families who hold valid fishing
23 permits to participate in Southeast Alaska’s commercial troll salmon fisheries, and do so to
24 harvest salmon for their livelihood. Decl. of Amy Daugherty at ¶ 2; Decl. of Tad Fujioka at ¶ 3.
25 There is thus a clear relationship between the Applicant’s members’ legally protected interests in
26 making their living by salmon fishing and the Plaintiff’s request that this Court order “prey

1 abundance and availability for Southern Resident killer whales.” In effect, Plaintiff seeks to
2 further limit Southeast Alaska’s salmon harvests. It is well accepted that such an economic
3 interest is sufficient for purposes of intervention. *See, The Wilderness Society v. U.S. Forest*
4 *Service*, 630 F.3d 1173, 1179 (9th Cir. 2011 (*en banc*)).

5 Applicant’s missions include preservation and restoration of habitat for commercially
6 fished species, as well as promoting biological and economic sustainability in all commercial
7 fisheries. Decl. of Amy Daugherty at ¶¶ 4-9. The Applicant has already played a central role in
8 efforts to reduce (and as much as feasible, to eliminate), conflicts between commercial ocean
9 fishing gear and marine mammals. For example, ATA and its members have submitted
10 comments to federal and state agencies on these issues, have provided testimony and evidence in
11 government hearings, and have worked closely with government agencies as part of efforts to
12 protect salmon and their habitat and ensure the fishery is environmentally sustainable. Decl. of
13 Amy Daugherty at ¶¶ 5-9. It is also well accepted that such conservation interests are sufficient
14 for purposes of intervention. *See Sagebrush Rebellion*, 731 F.2d at 526-28 (finding
15 environmental groups’ “environmental, conservation and wildlife interests” sufficient for
16 intervention as a matter of right). Applicant’s economic and livelihood interests in the Southeast
17 Alaska commercial troll salmon fishery that Plaintiff seeks to curtail, and also its own long-term
18 conservation efforts to limit other conflict problems with marine sea life generally, both would
19 satisfy the “protectable interest” requirement of Rule 24(a). *See also U.S. v. Aerojet General*
20 *Corporation*, 606 F.3d 1142, 1149 (9th Cir. 2010).

21 **D. Applicant’s Interest May Be Impaired As a Result of This Litigation.**

22 An applicant for intervention as of right must be “so situated that disposing of the action
23 may as a practical matter impair or impede the applicant’s ability to protect its interest.” Fed. R.
24 Civ. P. 24(a) (emphasis added). This impairment requirement should be viewed “as a practical
25 matter” and “is not limited to consequences of a strictly legal nature.” *Forest Conservation*
26 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (quoting *Natural Res.*

1 *Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th
2 Cir. 1978)); *see also* Fed. R. Civ. P. 24, advisory committee's notes. ("If an absentee would be
3 substantially affected in a practical sense by the determination made in an action, he should, as a
4 general rule, be entitled to intervene.").

5 Here, Applicant easily meets the third requirement for intervention as of right. WFC
6 filed its Complaint for the express purpose, among other relief, of curtailing or closing down
7 commercial ocean salmon fishing in southeast Alaska under the ESA. Should Plaintiff succeed,
8 many of Applicant's commercial fisher members' economic interests in the harvest and
9 marketing of salmon would greatly suffer as a direct result. Decl. of Paul Olson at ¶ 19; Decl. of
10 Tad Fujioka at ¶¶ 13-15. Such a potential economic injury is clearly sufficient to satisfy the
11 "impairment" requirement for intervention as of right. *See U.S. v. Alisal Water Corporation*, 370
12 F.3d 915, 919, 58 Fed. R. Serv. 3d 562 (9th Cir. 2004) ("to trigger a right to intervene ... an
13 economic interest must be concrete and related to the underlying subject matter of the action.")

14 **E. Applicant's Interests Are Not Adequately Represented.**

15 The final requirement for intervention as of right is a showing that the existing parties to
16 the litigation may not adequately represent Applicant's interests. *See, e.g., Prete, supra*, 438
17 F.3d at 956 (9th Cir. 2006). In determining whether Applicant's interests are adequately
18 represented by the present parties, this Court should consider "'whether [a present party] will
19 undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and
20 willing to make such arguments, and whether the intervenor offers a necessary element to the
21 proceedings that would be neglected.'" *Id.* (quoting *Sagebrush Rebellion*, 713 F.2d at 528)
22 (brackets in original) (emphasis added). To satisfy this fourth requirement, an intervenor need
23 only make the "minimal" showing "'that representation of its interests 'may be' inadequate . . .'"
24 *Id.* (quoting *Sagebrush Rebellion*, 713 F.2d at 528) (ellipses in original). In determining whether
25 an applicant's interests are adequately represented, this Court should focus on "the 'subject of
26 the action,' not just the particular issues before the court at the time of the motion." *Southwest*

1 *Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001).

2 In the present case, none of the present parties adequately represents Applicant's
3 interests. WFC has already petitioned the court to order further mitigation measures to increase
4 prey (salmon) abundance, which can only mean further curtailment of the Southeast Alaska
5 ocean troll salmon fishery. The National Marine Fisheries Service ("NMFS"), on the other hand,
6 is the regulatory agency with primary responsibility for enforcing the Endangered Species Act
7 ("ESA") in ocean water fisheries, but does not have the first-hand experience or knowledge that
8 the hands-on commercial fishing participants have about what will, as a practical matter, work
9 (or not work) as to gear modification, time and area limitations and other potential mitigation
10 measures to help reduce these conflicts, and thus to represent fishing industry interests as
11 effectively and knowledgeably as the commercial fishing men and women themselves.
12 Accordingly, neither Plaintiff nor federal Defendants adequately represent Applicant's interests
13 in the subject matter of this litigation. This is more than sufficient for intervention. *Trbovich v.*
14 *United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 30 L. Ed. 2d 686, 15
15 Fed R. Serv. 2d 1083 (1972).

16 **V. APPLICANT SATISFIES STANDARDS FOR PERMISSIVE INTERVENTION.**

17 As detailed above, Applicant meets all of the requirements for intervention as of right
18 under Rule 24(a). However, if this Court denies Applicant's intervention as of right, Applicant
19 should alternatively be granted permission to intervene under Rule 24(b). This Rule provides for
20 permissive intervention when an applicant "has a claim or defense that shares with the main
21 action a common question of fact or law." Fed. R. Civ. P. 24(b). In determining whether to
22 allow permissive intervention, this Court should consider "whether the intervention will unduly
23 delay or prejudice the adjudication of the original parties' rights." *Id.*, 24(b)(3). In addition, this
24 Court should examine whether Applicant's participation "will significantly contribute . . . to the
25 just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd.*
26 *of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

1 Here, as discussed above, Applicant’s intervention will not cause any delay or prejudice
2 the existing parties to the case. In addition, Applicant’s expertise in the science and practical
3 mechanics surrounding salmon fisheries could well contribute to the resolution of this case.
4 Given the importance of the issues involved in this case, the stake Applicant has in the fate of
5 these valuable fisheries, and the early stage of the litigation, this Court should, in the alternative,
6 allow its permissive intervention. The courts have adopted a liberal policy in favor of
7 intervention, recognizing that intervention can foster judicial efficiency by preventing or
8 simplifying future litigation involving related issues. *City of Los Angeles*, 288 F.3d at 397-98.
9 Here, the interests of judicial economy and efficiency are furthered through consideration of
10 ATA’s interests and, consequently, granting intervention is appropriate.

VI. CONCLUSION

12 Applicant respectfully asks the Court to allow intervention as of right under Rule 24(a)
13 because (1) Applicant’s motion to intervene is timely, and Applicant will abide by any briefing
14 schedule set by the Court; (2) Applicant has a significant interest in the subject matter of this
15 case; (3) Applicant’s interest may be impaired if intervention is not allowed; and (4) none of the
16 existing parties adequately represent Applicant’s interests. However, if the Court decides that
17 the Applicant has not satisfied the requirements of Rule 24(a), Applicant asks the Court to
18 exercise its broad discretion and allow Applicant to intervene pursuant to Rule 24(b). Such an
19 exercise of discretion is justified because inclusion of Applicant will not delay the case or
20 prejudice the existing parties and may facilitate prompt resolution of this controversy.

CONSULTATIONS WITH COUNSEL

Prior to this filing, Counsel for the Applicant has consulted with the lead Counsel for the Wild Fish Conservancy (“WFC”) as Plaintiff and with Fred Turner and Coby Howell, counsel for Defendants. As set forth at the beginning of this Motion, Plaintiff Wild Fish Conservancy does not oppose the requested intervention but requests the setting of appropriate conditions. *See* Fed. R. Civ. P. 24(a) Advisory Committee Note on 1966 Amendment (“An intervention of right

1 under the amended rule may be subject to appropriate conditions”). Specifically, the
2 Conservancy requests that the intervention order extend the page limits of LCR 7 for the
3 Conservancy when responding/replying to two separate briefs filed by Federal Defendants and
4 Intervenor by an additional 66% of the applicable limit (e.g., for a brief with a 12-page limit, an
5 additional eight pages would be permitted). Defendants stated they would “take no position” on
6 this motion or the requested page extension. Accordingly, this Motion is unopposed, and the
7 Proposed Order granting intervention includes the Reply brief-page extension requested by
8 Plaintiff.

9 DATED: April 23, 2020.

10 *s/ Thane W. Tienson*
11 Thane W. Tienson, WSBA #13310
12 Email: ttienson@lbblawyers.com
13 *Attorneys for Intervenor-Defendant Applicant*
14 *Alaska Trollers Association*

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2020, I served the foregoing UNOPPOSED MOTION TO INTERVENE BY ALASKA TROLLERS ASSOCIATION on the following individual(s):

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- by the Court's CM/ECF system to the email addresses listed above
 - by facsimile pursuant to the fax numbers listed above
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s/ Kathy Baker

Kathy Baker, Legal Assistant to Thane W. Tienson
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